United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 883

Case No. 947: CELLERIER ET AL.

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas at the request of Monique Cellerier, Alexandra Kabugua, Qin Zilan, Luo Guang Fu, Gildardo Gonzalez-Perez, Esther Nyilibambe-Nzigiye, Laura Morros, Michele Razafindratandra, Brigitte Rakotomalala , Inna Korneeva, and Anna Gobena, current and former staff members of the United Nations Environmental Programme (hereinafter referred to as UNEP), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 August and 30 November 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 10 October 1996, the Applicants filed an application requesting the Tribunal, inter alia:

"7. ...

(a) *To rescind* the decision of the Secretary-General to suspend payment of the salary supplement announced in IC/NAIROBI/1995/24 of 19 April 1995 (...);

(b) *To order* that the said salary supplement be reinstated with retroactive effect from 1 May 1995;

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(c) *To award* the Applicants appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicants as a result of the Respondent's actions or lack thereof;

(d) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at two year's net base pay in view of the special circumstances of the case;

(e) *To award* the Applicants as costs, the sum of $6,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 12 September 1997;

Whereas the Applicant filed written observations on 10 October 1997;

Whereas on 2 July 1998, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicants are current and former General Service staff members of UNEP in Nairobi with international recruitment status. At the time of filing of the application, Monique Cellerier served on a fixed-term appointment as a Proofreader/Copy Preparer at the G-7 level; Alexandra Kabugua served on a permanent appointment as a Documents Assistant at the G-6 level; Qin Zilan served on a fixed-term appointment as a Conference Typist at the G-5 level; Luo Guang Fu served on a fixed-term appointment as a Conference Typist (Team Leader) at the G-5 level; Gildardo Gonzalez-Perez served on a permanent appointment as a Conference Typist at the G-6 level (he has since separated from service, upon retirement on 30 June 1997); Esther Nyilibambe-Nzigiye served on a fixed-term appointment as a Conference Typist at the G-4 level; Laura Morros served on a fixed-term appointment as a Junior Correspondence Assistant at the G-7 level; Michele Razafindratandra served on a fixed-term appointment as Supervisor, Correspondence Unit, at the G-6 level; Brigitte

Rakotomalala served on a fixed-term appointment as a Conference Typist, at the G-4 level; Inna Korneeva served on a fixed-term appointment as a Senior Conference Typist, at the G-5 level (she separated from service on 27 November 1996); and Anna Gobena served on a fixed-term appointment as a Secretary at the G-4 level.

On 31 January 1995, the internationally recruited General Service staff, UNEP, Nairobi (IGS staff), sent a memorandum to the Chief, Compensation and Classification Service, SACCD/OHRM, complaining that their living conditions had deteriorated due to a variety of problems, including inflation and devaluation of currency, and that the UN principle of basing General Service salaries on the "best prevailing local conditions" did not work in extreme situations such as theirs in Nairobi.

On 29 March 1995, the Chief, Compensation and Classification Service, SACCD/OHRM, sent a fax to the President, Staff Association, UNEP, Nairobi, stating:

> "... WE HAVE CAREFULLY REVIEWED THE CONTENTS OF THE 31 JANUARY 1995 MEMORANDUM FROM THE INTERNATIONALLY RECRUITED STAFF IN NAIROBI. ... BE ADVISED THAT WE HAVE CONSIDERED A NUMBER OF OPTIONS DESIGNED TO ALLEVIATE THE SITUATION BEING FACED BY THE STAFF CONCERNED AND HAVE DRAWN UP A PROPOSAL WHICH IS TO BE DISCUSSED WITH AND CLEARED BY BOTH THE CONTROLLER AND THE ASSISTANT SECRETARY GENERAL FOR HUMAN RESOURCES MANAGEMENT."

On 11 April 1995, the Officer-in-Charge, OHRM, sent a cable to the Chief, Human Resources Management Service, UNEP, and the President, Staff Association, UNEP, in Nairobi stating in relevant part:

> "GIVEN SITUATION BEING FACED BY IGS STAFF SERVING AT NAIROBI, PLEASE BE ADVISED THAT HAVE DECIDED, AS AN EXCEPTIONAL MEASURE, TO ESTABLISH A NON-PENSIONABLE SALARY SUPPLEMENT IN THE AMOUNT OF KENYAN SHILLINGS [KSH]64,590 PER MONTH TO BE PAID TO ALL IGS STAFF SERVING AT NAIROBI SPECIAL [KSH] SALARY

SUPPLEMENT IS TO BE PAID EFFECTIVE 1 APRIL 1995. THE AMOUNT IS TO BE REVIEWED ON A QUARTERLY BASIS, WITH THE NEXT REVIEW TAKING PLACE IN JUNE 1995 DURING WHICH TIME, SPECIAL MONTHLY SALARY THIS SUPPLEMENT WOULD BE ADJUSTED (UPWARDS OR DOWNWARDS) BASED ON THE PREVAILING 'AFTER 120 DAYS', RATE OF DSA IN LOCAL CURRENCY."

In a memorandum dated 19 April 1995, the Acting Chief, Administrative Service, UNEP, conveyed this information to the IGS staff in Kenya.

On 27 April 1995, the Acting Chief, Administrative Service and the President, UNEP Staff Association wrote to the Assistant Secretary-General, Department of Administration and Management, explaining that the decision to grant a salary supplement to the IGS staff "has caused considerable resentment among local level GS staff." Commencing on or about 27 April 1995, locally recruited General Service staff members of UNEP, Nairobi staged a series of protests in which they demanded that they receive the same salary supplement that had been granted to IGS staff members.

On 5 May 1995, the Under-Secretary-General for Administration and Management sent a fax to the Executive Director, UNEP, stating in part as follows:

"3. BASED ON THE INFORMATION SUPPLIED BY COMPARATOR EMPLOYERS, AM HEREWITH MAKING ADMINISTRATIVE DECISION TO EXCEPTIONALLY APPROVE AN INCREASE OF AN ADDITIONAL 10 PER CENT SALARY ADVANCE TO THE 10 PER CENT GRANTED EARLIER THIS YEAR, THUS AGGREGATING IN TOTAL 20 PER CENT OVER CURRENT GENERAL SERVICE AND NATIONAL OFFICER NET SALARIES. THIS MEASURE IS APPROVED WITH EFFECT FROM 1 APRIL 1995 AND WILL BE INCORPORATED INTO THE RESULTS OF THE MINI-SURVEY WHICH IS SCHEDULED TO TAKE PLACE IN JUNE/JULY 1995. ...

4. MOREOVER, I ALSO WISH TO ADVISE YOU THAT I HAVE SERIOUS RESERVATIONS CONCERNING THE BASIS FOR THE ESTABLISHMENT, AS WELL AS THE LEVEL, OF THE SUPPLEMENT IN THE AMOUNT OF KSH 64,590 APPROVED FOR THE INTERNATIONAL GENERAL SERVICE STAFF

IN LIGHT OF THE FACT THAT LOCAL COMPARATOR PRACTICE WOULD NOT SEEM TO SUPPORT SUCH PRACTICE. IN MY VIEW, SUCH SUPPLEMENT WAS INADVERTENTLY APPROVED BASED ON OTHER CONSIDERATIONS. I WOULD THEREFORE ASK YOU TO SUSPEND THE GRANTING OF THIS BENEFIT, EFFECTIVE 1 MAY."

On 12 May 1995, the Under-Secretary-General for Administration and Management, wrote to the Executive Director, UNEP, responding to a memorandum dated 8 May 1995, from IGS staff in Nairobi, challenging the legality of the Respondent's suspension of the salary supplement. In his memorandum, the Under-Secretary-General repeated his "serious reservations concerning the basis of [the salary supplement's] establishment" and expressed his "strong view that the supplement was approved based on other considerations which are difficult to reconcile with local prevailing conditions." He thus confirmed that "pending the results of a comprehensive review by Headquarters ..., payment of the supplement has been suspended."

On 21 July 1995, the Applicants requested the Secretary-General to review the administrative decision to suspend payment of the salary supplement.

On 3 January 1996, the Applicants requested the Secretary-General's consent to submit an appeal directly to the Tribunal. On 29 February 1996, he gave such consent "since the claims raise only issues of law."

On 10 October 1996, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. Once the salary supplement had been announced and promulgated in an administrative issuance, and paid to designated individuals who subsequently relied upon the expectation of ongoing payment, it became a condition of service which could not be unilaterally withdrawn.

2. The manner in which the Respondent rescinded the special salary supplement was illegal because such rescission (i) was made without sufficient notice and without consultation with representatives of the staff concerned, as required by the Staff Regulations and Rules; (ii) was made retroactive; (iii) was made without appropriate transitional measures to prevent undue financial hardship to the Applicants; (iv) violated the terms of procedure set forth in the cable dated 11 April 1995, which instituted the salary supplement; and (v) was improperly motivated by the protests and threats of the locally recruited General Service staff members.

Whereas the Respondent's principal contentions are:

1. Statutory entitlements of staff members are limited to those contained expressly or by reference in the Staff Regulations and Rules. Administrative measures to supplement statutory entitlements pending their revision may be introduced and withdrawn if such actions are reasonable exercises of discretion.

2. The manner of withdrawal of the special supplement was reasonable as more permanent measures were introduced at the same time. The Applicants cannot reasonably have entered into long-term financial commitments on the basis of a supplement that was in place only one month, and whose continuation was never assured; indeed, the established methodology envisaged a limit of 3 months on special measures.

The Tribunal having deliberated from 14 July to 4 August 1998, now pronounces the following judgement:

I. The issues presented by the Applicants are identical, and the Tribunal therefore orders the joinder of the applications.

II. These proceedings question a decision by the Secretary-General to suspend and thereby effectively abolish payment of a special non-pensionable salary supplement which had been awarded to the Applicants, internationally recruited General Service (IGS) staff employed in the United Nations Environmental Programme (UNEP) in Nairobi, Kenya, in April 1995.

Since the facts of the case are not in dispute and since the claim raises only issues of law, the Secretary-General agreed to the Applicants' request that consideration by the Joint Appeals Board will not be necessary. Thus, under article 7 of the Statute of the Tribunal, this appeal will be heard and determined directly by the Tribunal.

III. It is clear from the documentation submitted and from the agreed facts that the salary supplement with which we are concerned was awarded to cater to the special needs of IGS staff and was awarded over and above across-the-board salary increases that had earlier been awarded. The earlier across-the-board increases were payable to both internationally recruited staff and to locally recruited staff. The special salary supplement was awarded to IGS staff only and was designed to accommodate what was perceived to be their special needs and problems, including housing and security needs which were not shared by locally recruited staff. It was also intended to alleviate the problems and difficulties which were being encountered by UNEP in recruiting and retaining IGS staff with skills which were not enjoyed commonly by the locally recruited staff. In short, the Tribunal is satisfied that this salary supplement was awarded to satisfy the special needs of IGS staff.

IV. The Tribunal observes that this salary supplement was announced by circular addressed to all IGS staff in Nairobi and stated to have been established "given the situation being faced by IGS staff at Nairobi." It was also stated that it would be reviewed on a quarterly basis, the next review taking place in June 1995, at which time it would be adjusted

upwards or downwards based on the then prevailing "after 120 days" rate of daily subsistence allowance in local currency.

The Tribunal notes that, at the time when the salary supplement was awarded, the severe economic and security conditions which existed in Nairobi had overwhelmed the normal mechanism for salary adjustment and that it had been noted by the Chief, Compensation and Classification Service, that local comparators did not employ staff whose duties were equivalent to IGS staff and that therefore "there [was] no measuring stick available locally". He had recommended the special salary supplement as a temporary expedient, pending a definitive solution.

V. The Tribunal is satisfied that the decision of the Under-Secretary-General for Administration and Management dated 5 May 1995, to suspend payment of the special salary supplement was, by and large, motivated by the unrest which the decision to pay same had caused amongst the locally recruited staff and their threatened strike action. This is, in effect, conceded on behalf of the Respondent, who agreed as follows:

> "Respondent submits that the special supplement effective 1 April 1997, was obviously a good faith emergency measure to deal with a unique situation. However, immediately after its adoption it became apparent that the solution was untenable and would result in continuing strife (...). Respondent submits that a decision to withdraw the supplement in these circumstances is a reasonable exercise of discretion and asks the Tribunal to dismiss Applicants' unsubstantiated allegations that the withdrawal was improperly motivated."

VI. The Tribunal notes that the decision to suspend payment of the salary supplement was made on the 5th day of May 1995, to be implemented retroactively to the 1st day of May 1995, and that the decision was made and promulgated well before the promised review date, which was June 1995. The Tribunal is satisfied that there were no apparent changes in circumstances which could have justified a decision that the perceived special needs of IGS staff no longer existed. In the facsimile transmission from the Under-Secretary-General for

Administration and Management of 5 May 1995, announcing suspension of payment of the salary supplement, he gave as reasons for deciding to suspend payment "his serious reservations concerning the basis for the establishment, as well as the level of the supplement ... in light of the fact that local comparator practice would not seem to support such practice". This could hardly have constituted a surprise, as the Chief, Compensation and Classification Service, who had recommended this very salary supplement, had clearly acknowledged that "there [was] no measuring stick available locally". Further, the Tribunal can find no grounds for supporting the contention that it had been made inadvertently, as it is clear that the decision to pay the supplement was made after significant consideration of a number of factors, and those factors are clearly identifiable.

VII. The Tribunal further notes that, following the suspension of the IGS staff salary supplement, a series of across-the-board salary increases took place, with similar increases being enjoyed by both IGS staff and locally recruited staff. The Tribunal therefore finds that these increases cannot be taken as being in substitution for the salary supplement which had been awarded solely to the IGS staff to cater to their special needs.

VIII. The Tribunal is accordingly satisfied in all of the circumstances that the decision to suspend the payment of the salary supplement to IGS staff was improperly motivated and that it was not done for sound technical or financial reasons, but for political considerations which were related to the protests of the locally recruited General service staff and to their threatened strike action and that the decision constituted an improper exercise of discretion.

The Tribunal is further satisfied that the decision to award the special salary supplement was a lawful one, notwithstanding that it did not accord with a comparison with comparators. The Tribunal notes that the Respondent, in his answer, submitted as follows:

> "Respondent notes moreover that the Organization is not precluded, under the methodology for establishing General Service salaries and emoluments at non-

> Headquarters duty stations (...), from granting, from time to time, special supplements or ad hoc payments in response to special conditions or emergencies, and it has done so in various duty stations in circumstances of severe financial hardship or force majeure. The CCAQ [Consultative Committee on Administrative Questions] Salary Survey Manual provides in its Part VII: SPECIAL MEASURES that:
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> > 'Should special measures be decided upon, they should preferably be in the form of non-pensionable payments, and should at any rate be limited to a maximum of three months, subject to termination as soon as conditions permit salary comparisons to be made on the basis of normal criteria and procedures.' (emphasis added) (...)"

IX. The Tribunal, being mindful of the content of the CCAQ Salary Survey Manual, and the quote therefrom referred to by the Respondent in his answer, and being mindful that the reviews were to take place every three months, awards the sum of three months loss of salary supplement to the Applicants by way of compensation. Since a supplement for April had been paid, it awards to the Applicants the equivalent of the supplement which they would have received in May and June. In addition, as compensation for the manner in which the salary supplement had been unlawfully abolished, the Tribunal awards one additional month of salary supplement, corresponding to the month of July 1995, calculated in accordance with the rules set forth in the cable dated 11 April 1995 that established the salary supplement at issue.

The Tribunal cannot accept and does not accept that the Applicants had a legal or legitimate expectation in the payment of the supplement continuing indefinitely or for a prolonged period as it was introduced as a temporary measure and as an exceptional measure, pending the introduction of a definitive solution. Accordingly, the Tribunal does not accept that the Applicants could reasonably have entered into any long-term financial commitments based on an assumption that the salary supplement would have been payable for an indefinite or for a substantial period into the future.

X. For the foregoing reasons, the Tribunal orders:

1. That the Applicants be paid the equivalent of the supplement which they would have received in May and June 1995.

2. That the Applicants be paid as compensation, one additional month of salary supplement, corresponding to what such supplement would have been for the month of July 1995, in accordance with the rules set forth in the cable from OHRM dated 11 April 1995, which established the salary supplement at issue in this case.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Kevin HAUGH
Member

Geneva, 4 August 1998

R. Maria VICIEN MILBURN
Executive Secretary